IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 24, 2006 Session

# STATE OF TENNESSEE v. JENNIFER ANN HARGROVE AND THOMAS DAVID GAMBRELL

**Direct Appeal from the Criminal Court for Davidson County**
**No. 2003-C-2204 Cheryl Blackburn, Judge**

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**No. M2005-00300-CCA-R3-CD - Filed July 7, 2006**

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Defendant, Jennifer Ann Hargrove, entered a best interest plea to attempted aggravated child abuse. Defendant, Thomas David Gambrell, entered a guilty plea to attempted aggravated child neglect Each agreement included an eight year sentence agreed to by the State and each Defendant, with the manner of service of the sentence to be determined by the trial court. Following a sentencing hearing, the trial court sentenced Defendant Gambrell and Defendant Hargrove as Range I, standard offenders, and ordered both Defendants to serve eight (8) years in the Department of Correction. The trial court denied split confinement as set forth in Tennessee Code Annotated section 40-35-306 (2003). On appeal, pursuant to Tennessee Code Annotated section 40-35-103(1)(A)-(C) (2003), both Defendants challenge the trial court's denial of split confinement. We affirm the judgments of the trial court.

**Tenn. R. App. P. 3, Appeal as of Right; Judgments of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Peter D. Heil, Nashville, Tennessee, (on appeal); and Thomas T. Overton, Nashville, Tennessee (at trial and on appeal); for the appellant, Thomas David Gambrell; Ross E. Alderman, District Public Defender; Jeffrey A. DeVasher, Assistant Public Defender, (on appeal); Laura Dykes, Assistant Public Defender, (at trial); and Laura Getz, Assistant Public Defender, (at trial), Nashville, Tennessee, for the appellant, Jennifer Ann Hargrove.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Katrin Miller, Assistant District Attorney General; and Roger Moore, Assistant District Attorney General, for the appellee, the State of Tennessee.

## OPINION

### I. Background

The facts as set forth by the State at the negotiated plea proceeding are as follows:

[O]n April 16, 2001, Jennifer Hargrove gave birth to a baby girl at 436A Tyler Drive, here in Davidson, County.

A 911 call was later placed from that residence, later in the morning. Paramedics arrived there and found the baby with cut injuries to her throat.

Present at the time the paramedics arrived were Jennifer Hargrove, her boyfriend and the father of the baby, Thomas Gambrell, and Mr. Gambrell's parents.

The baby was taken to Summit Hospital where Jennifer Hargrove initially said she did not know what happened to the baby. The baby was then transported to Vanderbilt Hospital. Detective Hugh Coleman of the Metro Police Department was assigned to investigate the case.

He interviewed Ms. Hargrove several times and she finally admitted that she did give birth to her baby at the house on Tyler Drive. She said that she did use a knife to cut the baby's throat. She stated that she did place the baby in a plastic bag in the trunk of her car, and she said she did not remember anything else about the baby.

She also told Detective Coleman that Thomas Gambrell was asleep when she had the baby. She told the police that she did this to the baby because they could not afford a baby.

Thomas Gambrell was also interviewed by Detective Coleman. He gave several conflicting statements about his whereabouts and his involvement in the case; however, he steadfastly denied any involvement in cutting the baby's throat; however, he did admit that he found the baby inside the trunk of the car outside [the house]. He closed the lid on the trunk and went to his parents' house to bring his parents back to the scene.

When they got there, they did take the baby out of the trunk of the car and his father called 911.

After Ms. Hargrove admitted to the police that she did cut the baby, . . . she later gave [inconsistent] statements denying that she would do anything to hurt her baby, and [in] a further [inconsistent] statement, she stated she had her baby and then went into the bedroom.

> Thomas Gambrell admitted that his father washed blood off the sidewalk of the house out front. Investigation also revealed that there was a massive clean-up in the house to remove all evidence of blood, including bleach on the carpet, and a blanket in the washing machine that was still damp from being washed.
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> If this case had gone to trial, Dr. Bruce Levy would have testified that in his opinion, the person who inflicted the injuries on the baby was right-handed, and . . . testimony at trial would have indicated that Jennifer Hargrove is left-handed.
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> In spite of the injuries to this baby, she has been adopted and is doing well.

Defendant Hargrove entered a knowing and voluntary "best interest" plea to the charge of attempted aggravated child abuse. Defendant Gambrell entered a knowing and voluntary guilty plea to attempted aggravated child neglect.

**II. Sentencing Hearing**

At the sentencing hearing, Detective Hugh Coleman testified as to information garnered during his investigation of the incident. Detective Coleman worked for Metro Police Department in the Criminal Investigation Division, Homicide Unit. On April 16, 2001, Detective Coleman and Detective Pierce, now deceased, were assigned to investigate the injuries to the infant.

Detective Coleman interviewed Defendant Hargrove at Summit Hospital. Defendant Hargrove initially told the detective that she had gone to the bathroom and while standing near the shower, she felt a sharp pain. "She described her water breaking, and said she delivered the baby at that point. She said she contacted her boyfriend, who was Thomas Gambrell, and the next thing she knew, the ambulance was taking her to the hospital." Defendant Hargrove initially indicated that her boyfriend was not at the house and that she had to call him to come to the house.

Defendant Gambrell initially told Detective Coleman that "he had gotten up that morning, left to go to work, to do some work at his parent's house, and . . . that he was aware that Ms. Hargrove's back had been bothering her, so he went home to check on her." Defendant Gambrell said he walked into the house to check on his girlfriend and that is when he discovered the baby lying in the bathroom floor.

Because Defendant Gambrell and Defendant Hargrove gave inconsistent statements, Detective Coleman questioned Defendant Hargrove again. Defendant Hargrove again explained that she had gone into the bathroom, felt a sharp pain, her water broke, and she delivered the baby. This time however, she said that the baby was stillborn, and she had placed it in a plastic bag and put the bag in the trunk of her car. She then went inside to retrieve something and when she returned to the car she realized that the baby was alive. Defendant Hargrove said that she removed the infant from the trunk and took her back inside the house. She then used a knife to cut the infant's throat. Defendant Hargrove claimed that she did not know how or from where she had obtained the knife.

This admission was the first time Detective Coleman became aware that Defendant Hargrove had used a knife to cut the baby's throat. He informed Detective Pierce and they tape-recorded this version of Defendant Hargrove's statement. Once she was released from the hospital, the statement was videotaped. The only discrepancy between the two recorded statements was that in the tape-recorded interview, she said that Defendant Gambrell was home at the time the baby was delivered.

Detective Coleman went to Defendants' home on the day the baby was delivered. Detective Coleman observed a black Ford Focus in the driveway. He noticed that there were stains on the trunk of the car which appeared to be in the shape of fingers and appeared to have been made with blood. There were also two spots on the sidewalk which he thought might have been blood.

Inside the home, he observed several distinct markings on the carpet which he identified as bleach stains. The stains were circular and noticeably lighter than any of the other carpet. There were "several drops of blood" in the bathroom. These droplets were in the shape of circles "as if a drop of blood had hit the floor and dried on the outer ring, but was wiped up while the center was still wet." He also observed a pair of yellow shorts which had blood on them on the bathroom floor.

Detective Coleman was unsure, but the kitchen floor appeared to have a "faint tint of red, it looked like maybe some red substance had been wiped." On the kitchen counter, there was a Goody's shopping bag which he later discovered contained blood soaked paper towels. In the utility room, just off the kitchen, Detective Coleman saw a trash bag containing clothes and noticed that there was a "tremendous amount of what [he] believed to be blood . . . on the top of that bag, on the clothing, and some on the plastic bag itself." There was a blanket inside the washing machine which was still damp to the touch. The blanket "was forced against the tub of the washing machine as if it just finished spinning." Detective Coleman did not recall seeing any blood in the bedroom or going into the bedroom.

It was Detective Coleman's opinion that someone had gone to great lengths to clean up blood both inside and outside of the house. Defendant Hargrove had no memory of anyone cleaning the house and denied doing so herself. She told Detective Coleman where he could find the knife she had used to cut the infant's throat. She described the knife in detail. Detective Coleman found the knife soaking in the kitchen sink at Defendants' house along with another identical knife. The knives had white plastic handles and blades approximately three-and-one-half inches in length.

Detective Coleman also had an opportunity to take a more detailed statement from Defendant Gambrell. The statement was videotaped. Defendant Gambrell also submitted an additional handwritten statement which essentially tracked the videotaped statement. This handwritten statement was read into evidence at the sentencing hearing and stated as follows:

> On the morning of 4/16/01, I woke up to see my girlfriend, Jennifer Hargrove, in her nightgown and her hair wet. I proceeded to get in the shower around seven A.M. I asked her what was in the washer. She said the blanket. As I got in the shower, I noticed blood on the tub side. I did not think anything about it at first. As I got out,

I saw a pair of shorts, yellow, behind the door that was covered with blood. I asked her if she was okay. She said her back was hurting. I didn't think that was right. I seen a couple of bleach stains on carpet that was not there prior to me going to bed. I asked her what it was from. She said blood. I said what happened? No answer. I got mad because she was not telling me something.

I walked outside, seen blood behind her car, a puddle approximately three inches or more in diameter. I opened [sic] trunk, seen my child in [sic] trunk. I freaked out, shut [the] lid, ran inside, asked Jennifer, I said is there something you need to tell me? She said no. Then I got mad and said, bullshit, what is in the trunk? Was my child stillborn? She said yes. I ran, got in my truck and got my mother and told [her] Jennifer has had a stillborn. She asked me where. I said at the duplex. She said where is the baby? I said I think in the trunk. She got ready, called my father. She left. I got in my truck and left behind her.

We got there. My daughter was still in the trunk. I got [the baby] out with the black trash bag, carried her in, laid her on the bathroom floor on the tile. She started breathing. I told my father to call 911. He did.

Jennifer was standing there screaming she's dead. Can we take [her] to my house and bury her? My mother said no. We got more towels, wrapped around Crystal. My mother picked her up and held her screaming I can't go through this again.

I took the trash bag and put it in the bed of my '95 green Dodge Dakota. My father was on the phone with 911 as I went outside to flag down the firefighters.

They came in, seen what they needed, and said they need more light, so I took the lampshade off. My father washed the blood off the sidewalk as we were leaving.

At the hospital, I told that I can't believe she put my baby in the trunk of her car. Now I am in trouble because it happened when I was asleep.

I told them I had no idea that she had the baby before I got up.

My father left Summit and was at the house when me and the detectives got there. The only people who have keys to my duplex are me, Thomas D. Gambrell, Jennifer Hargrove, and my brother, Patrick Gambrell.

Upon arrival, my father told me he throwed the bag away in a dumpster at AK Market. He said I was in enough trouble already. I asked him why he did it. He said he didn't know.

> After Detective Coleman told the events as they occurred at the time, he suggested not talking to Ms. Jennifer Hargrove at the hospital about what happened. I said okay.
> When I arrived at Summit Medical Center, I asked for some time with Jennifer. She said I love you. Then she said I had her in the bathroom floor. I freaked out and cut her. I don't remember the place, when and how I got the knife, and the whole time I was at Summit, she constantly keeps saying I love, I am sorry, Tom, because now the State won't let you have her. I didn't say one word.
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> My fingerprints were on the car from where I picked up my daughter, carried her inside and shut the trunk. I had no idea of what Jennifer had planned.
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> This is a signed statement from Tommy David Gambrell, 4/17/01.

Detective Coleman explained that Defendant Gambrell's second statement differed from his original statement in several ways. In his initial statement, Defendant Gambrell said that he put the plastic bag in the back of his truck and never explained what happened to it. It was not until his second statement that he admitted that his father had actually disposed of the bag. He also said in his second statement that the bloody fingerprints on the trunk of the Ford Focus belonged to him, and that he left the prints there when he removed the baby from the trunk. In his original statement however, he stated that it was the bloody fingerprints on the trunk that initially prompted him to open the trunk.

Defendant Gambrell rendered approximately five different accounts of how he discovered the child in the trunk of the car. In two versions of his story, Defendant Gambrell claimed to be working at his mother's when the child was born. In the three other versions, he was at his house when the child was born, but he was asleep and did not know his girlfriend had delivered the baby. Neither Defendant Gambrell or Defendant Hargrove admitted knowledge that she was pregnant. Defendant Gambrell acknowledged that he suspected she might be pregnant, while Defendant Hargrove denied any knowledge of the fact. According to Detective Coleman, the investigation into what actually happened was "hampered" by the clean up that had been carried out at the crime scene. Detective Coleman said that he was not "absolutely certain" which of the individuals had placed the baby in the trunk of the car.

On cross-examination, Detective Coleman agreed that the duplex where the incident occurred was approximately nine hundred square feet. He acknowledged that the bathroom where Defendant Hargrove delivered the baby shared a wall with the bedroom where Defendant Gambrell would have been sleeping during the birth. He stated that Defendant Gambrell admitted to moving the Ford Focus to cover a puddle of blood in the driveway. He admitted that the T.B.I. Crime Lab was unable to find blood on the knives recovered from the scene, therefore there was no DNA evidence that either of the knives were used in the crime. He stated that with respect to the clothes that were recovered as evidence, only one shirt and one pair of jeans were identified as belonging to Defendant

Hargrove. The lab determined that it was Defendant Hargrove's blood on those clothes and not the infant's blood.

Defendant Gambrell testified that on the morning of the incident, he woke up and took a shower. He noticed that there was a pair of yellow shorts behind the bathroom door which had blood on them. When he went outside, he saw a puddle of blood by the trunk of Defendant Hargrove's car. He opened the truck of the car and saw a black trash bag containing the infant. The infant appeared blue in color and was not moving. Defendant Gambrell was in a state of shock. He shut the trunk and went back inside the house to confront Defendant Hargrove about the baby. She told him that the baby was stillborn and to leave it alone. At this point, Defendant Gambrell went to his parent's house to get help. He told his mother what had happened and they both returned to his house in separate vehicles. His parents' house was approximately three minutes from the duplex where he was living.

When he reached the house, Defendant Gambrell removed the infant from the trunk and laid her on the bathroom floor. He saw movement from the trash bag and realized that the baby was still alive. His father had also arrived at the house and Defendant Gambrell "screamed" for his father to call 9-1-1. While on the phone, the paramedics instructed the individuals to find a shoestring to tie off the umbilical cord. Defendant Gambrell searched, but could not find a shoestring, so his mother held the umbilical cord with her fingers while Defendant Gambrell went outside to flag down the paramedics.

When he went outside, Defendant Gambrell threw the trash bag that had contained the baby into the back of his truck. He assisted the paramedics in entering the house, and when they needed more light he helped by removing the lamp shade. Defendant Hargrove was screaming that the baby was dead and that she wanted to take her to her mother's house and bury her. He was not aware that the baby's throat had been cut until the paramedics mentioned a laceration and asked how it had happened.

After stabilizing the baby, the paramedics transported her to Summit Medical Center. Defendant Gambrell and his mother followed the ambulance in his mother's van. Defendant Gambrell later returned to the scene with Detectives Coleman and Pierce. The detectives wanted to investigate the crime scene, so he gave them the keys to the house and all of the automobiles. Defendant Gambrell denied cleaning any blood from the crime scene.

Defendant Gambrell said that he did not immediately call 9-1-1 when he found the infant because he did not have a "clear mind." He said if he could repeat the day, he would have called 9-1-1 as soon as he found the baby in the trunk. He said that he was miserable that the baby was taken away from him and his family, and he was upset that the baby would never see or know the family. He had not spoken to Defendant Hargrove since the incident.

At the time of the incident, Defendant Gambrell was not certain that his girlfriend was pregnant. He had an "idea" that she was pregnant and he asked her if she were pregnant on several

occasions. There were other people that suspected a pregnancy and had asked Defendant Gambrell if his girlfriend was pregnant. When he addressed the pregnancy questions to Defendant Hargrove, "she would verbally just completely go off and cuss from one end to the other, denying that she was pregnant." He said that he decided to believe her because she would have known if she were pregnant.

Defendant Gambrell testified that in the time since the criminal incident and before the sentencing hearing he had married a woman, not Defendant Hargrove, and they had two children. He said that he should not go to prison because he did not have a prior record, and he needed to be able to provide and care for his wife and children. He accepted responsibility for his actions during the incident. He had maintained employment since the incident occurred and had secured a position with a new employer that would become permanent should he avoid prison time. He said that he was aware that the judge might sentence him to serve time in prison for his involvement in the incident.

On cross-examination, Defendant Gambrell admitted that Defendant Hargrove was a minor when they started dating and that he was twenty-one-years-old at that time. He said that they began a sexual relationship when she was approximately seventeen, but they did not use any type of birth control. He knew that pregnancy was a possibility without some form of birth control.

Defendant Gambrell was not aware that Defendant Hargrove was no longer having a menstrual period. He thought that she was pregnant based on her mood swings and what other people said, but she never developed a "belly." She developed "a little bit of a stomach," but she was eating more food than normal. They were sexually active until a week before the baby was born. Defendant Hargrove had been living with Defendant Gambrell in his duplex for approximately one week. Prior to that time, they both lived with Defendant Hargrove's mother. They had sex in Defendant Hargrove's bedroom at her mother's house. Defendant Hargrove was nineteen years old at the time of the birth. He denied ever smoking marijuana with Defendant Hargrove or ever seeing her smoke marijuana. He acknowledged that they both smoked cigarettes.

Since the incident, Defendant Gambrell had married and had a seven-year-old stepson and a fifteen-month-old son. When his wife became pregnant, she told him she was pregnant. He felt the baby move during the pregnancy. He denied ever feeling movement from the baby carried by Defendant Hargrove. He said that his wife had her baby in approximately five hours and that she made audible noises, which he heard, during the delivery.

Defendant Gambrell said that he had always worked at maintenance jobs or repairing HVAC systems. He had his own tools and had historically carried a pocket knife when working. He acknowledged that the blade of a pocket knife is generally three inches in length.

Defendant Gambrell denied any involvement in delivering the child. He maintained that he was sound asleep during the birth and that he never heard any screaming or any noise related to the birth. He explained that he was a "hard sleeper" and that he had been diagnosed as having a severe

case of sleep apnea. His family was aware of his sleeping habits. He testified that he lied to the police about what actually occurred because he was scared and did not want to get his family involved in the incident. He denied physically harming the infant. He also said that at the time of the incident he wore pants with a 29-inch waist size.

John Holley testified that he was employed by the Davidson County Community Corrections program and conducted drug testing for the judicial system. On the day of the sentencing hearing, Mr. Holley performed drug tests on both Defendant Gambrell and Defendant Hargrove. Defendant Gambrell tested negative for drugs in his system. Defendant Hargrove's test revealed an adulterated/diluted sample, indicating that something had been added to the sample either during collection or by consumption prior to the sample being given. The sample was monitored, meaning that the collecting officer went into the restroom and watched Defendant Hargrove issue the specimen. Mr. Holley said that it was possible that Defendant Hargrove could have tampered with the specimen during collection, but the collecting officer indicated no abnormal behavior. The results of the test, which were entered into evidence, indicated that Defendant Hargrove tested positive for marijuana.

After being qualified as an expert in forensic pathology, Dr. Thomas Bennett testified that available medical literature did not allow any prediction of "handedness" based upon the wound patterns and the facts of the case. Although "handedness" was not explicitly defined through testimony, it can be inferred from the record that "handedness" is a reference to the hand, left or right, primarily used by an individual in performing tasks. He described the wounds to the infant's neck as a series of superficial wounds and one deep cut extending from the right side to the left side of the infant's neck. The cuts were administered by an adult, but the evidence did not reveal the exact position of that adult to the infant and vice-versa. Additionally, although the weapon was identified, the motion in which the knife was used to perform the cutting was not identified and could not be determined on the available facts.

Dr. Bennett stated that the standard medical practice in this area is to rely on peer reviewed literature to conduct an analysis of the wound. Dr. Bennett explained that "peer reviewed literature" begins when an individual takes a theory, tests that theory, and determines how often he or she is right or wrong with respect to the theory. The testing results are then submitted to some form of medical journal for publication. A team of experts or "peers" then reviews the theory and either accepts or rejects the theory for publication. If the theory is accepted, it is deemed "peer reviewed literature," meaning it has met the standards of the scientific community in which the individual is practicing.

After examining forensic literature, various journals, the National Library of Medicine, and textbooks compiled from peer reviewed literature, Dr. Bennett knew of "no peer reviewed literature that could support any conclusion as to the "handedness" of the assailant in this scenario or [a] similar scenario involving an adult cutting the throat of a newborn baby." Dr. Bennett testified that the available literature warned against concluding "handedness" in cases of cutting and slashing due to the dynamic nature of these injuries. Dr. Bennett read into evidence an excerpt from a treatise

describing the difficulty in attempting to discern "handedness" when a knife fight occurs between adults. Essentially, he testified that it would be impossible to make an accurate determination of "handedness" without knowing the position of the individuals involved at the moment the wound occurred. He also said that the assailant's strength in the present case had nothing to do with the manner in which the cuts were made. It was his opinion that the wounds inflicted on the infant could have been caused by a man, a woman, or a youth.

On cross-examination, Dr. Bennett admitted that he had not seen the actual knife used in the crime. He had seen only pictures of the knives that were recovered and a description that they were sharp. Dr. Bennett could not recall when, if ever, he had testified in Tennessee. He did recall testifying at Fort Campbell, Kentucky. He admitted being criticized by another expert for his diagnosis of shaken baby syndrome. He agreed that the treatise read into evidence dealt with mutual adult combat. He explained that his purpose in using that excerpt was that similar to a combat scenario, it is unknown what position the individuals were in when the cutting occurred in the present case. Dr. Bennett stated that based on the medical statements from Vanderbilt Medical Center, it could not be concluded that the cut was a right to left cut or vice-versa. Dr. Bennett never personally examined the infant.

Dr. Bruce Levy, the county medical examiner, was qualified as an expert in pathology and forensic pathology. As part of his involvement in this case, Dr. Levy reviewed various records and photographs of the infant's injuries. He examined the distribution of the injuries and the types of injuries as depicted in the photographs. He never personally examined the baby. He did personally inspect the knives and described them as paring knives with white, plastic handles. Dr. Levy described one of the knives as dull and incapable of cutting through skin. He said that the other knife, although not as dull as the first, "was borderline in its sharpness in terms of being able to cause the injuries" he observed in the photographs. Dr. Levy said that transecting the trachea, as was done to the infant, would not require much physical force, but more force was necessary to cut through the skin.

Based on his observations, Dr. Levy opined that the cut began on the right side of the infant's neck and moved toward the left side. In examining the photographs of the injuries, Dr. Levy noted that other than the one deep cut across the neck, the remaining superficial injuries were primarily on the right side of the neck. He also noted that the edges of the major cut displayed irregularities where the skin looked torn in addition to being cut, indicating that the knife was not sharp. These tears had "skin tags" which pointed toward the baby's right ear. Dr. Levy explained that when a knife catches on the skin and tears it, the "skin tag" will point toward the direction from which the weapon or force originated.

He also observed that some of the superficial injuries were under the chin as well as the right side of the neck. Because an infant does not have the muscle control to hold its head backward, Dr. Levy concluded that the infant's neck was flexed backward to give access for cutting. Dr. Levy analyzed the possible positions of the infant in light of her mobility and the injuries sustained. Although he could not know the actual position of the individuals, in Dr. Levy's opinion, the cuts

were inflicted by a right-handed person, but he added that it was possible that a left-handed person could also have inflicted the injuries. He also stated that when a mother gives birth, it is typically the mother who bleeds. Infants do not bleed unless the placenta is punctured or the umbilical cord is severed or there has been some other injury to the child.

On cross-examination, Dr. Levy admitted that it was not necessarily a right-handed person who inflicted the injury, but someone cutting with their right hand. He acknowledged that many people are ambidextrous and may perform different tasks with different hands. Dr. Levy disagreed with Dr. Bennett's opinion that an expert opinion on "handedness" cannot be given. He explained that in some situations where there are a lot of variables, i.e., position, movement, multiple injuries, then identifying "handedness" may be impossible. In situations where there is not much movement and the injuries are focused on one area, Dr. Levy said that it was his opinion that an expert opinion could be given regarding "handedness." He said that although there is no study exactly on point, there is "ample information about the appearance and nature of sharp force injuries and how they would appear based upon things like the type of wound, the type of the weapon, the direction it came from, the type of blade that was being used" to form an expert opinion about the nature of the injury in the present case.

Dr. Levy could not testify regarding how long the baby could have survived after sustaining the injury. He said the infant could not have survived past five minutes without oxygen so she must have been positioned such that air was able to move in and out of her lungs. From his observations, he said that the cut may have resulted in a "tracheotomy of sorts" and the baby was likely "breathing through the hole in its neck, straight in and out of the lungs." In such a situation, as long as there was enough oxygen, the baby would have been able to survive provided the hole in her neck did not become obstructed and there was no significant blood loss. According to Dr. Levy, when the paramedics arrived the umbilical cord had not been cut and the placenta was still attached to the baby. Therefore, any blood present at the scene had to have come from the mother or the cut on the baby's throat.

Agent Bradley Everett of the T.B.I., Forensic Division, Serology DNA unit, provided expert testimony regarding his examination of evidence from the crime scene. He examined the clothing taken from the laundry room at Defendant Gambrell's duplex, including one pair of men's Wrangler jeans, size 29x36, and one pair of men's Liberty camouflage pants, size 32x34. Agent Everett found blood matching Defendant Hargrove's blood type on the crotch and ankles of the Wrangler jeans. He also identified both Defendant Hargrove's blood and the baby's blood on the camouflage pants. He also examined a pair of blue jeans and a shirt belonging to Defendant Hargrove which contained only Defendant Hargrove's blood. None of the female clothing taken from the scene had the baby's blood on it.

On cross-examination, Agent Bradley said that it was possible that a female could have been wearing the men's jeans, particularly if she were pregnant and could no longer fit into her own jeans. He also said that the blood could have gotten on the men's jeans if the mother sat on them while giving birth.

Sue Gambrell, Defendant Gambrell's mother, testified that her son was a "very, very deep sleeper." She related that there were occasions when she had to call neighbors to go and wake him up because he would not hear the phone ringing if she called while he was sleeping. She said that on the morning of the incident, Defendant Gambrell came to her house and said that Defendant Hargrove had given birth to a stillborn baby and that Defendant Hargrove was going to take the baby to her mother's house and bury it.

Ms. Gambrell told her son that the baby could not be buried in that manner, and they proceeded back to his home to resolve the problem. Approximately ten minutes later, Ms. Gambrell and her son entered the duplex and she proceeded to the bedroom and began questioning Defendant Hargrove. Defendant Hargrove told her that the baby was born dead and that she was going to take the baby to her mother's house and bury it beside her dog. Ms. Gambrell again explained that a baby could not be buried in the backyard like a dog. Ms. Gambrell then left the room to call 9-1-1.

At this point, Defendant Gambrell entered the duplex carrying the infant and laid her in the bathroom floor. Ms. Gambrell and her son both saw the bag move and realized that the baby was still alive. Ms. Gambrell's husband called 9-1-1. She held the umbilical cord until the paramedics arrived. She did not remember the paramedics asking her any questions about what happened and she did not think the paramedics talked to Defendant Hargrove. While the paramedics were on the phone, Defendant Hargrove said that there was a tear in the baby's neck. Ms. Gambrell relayed this to the paramedics and they asked her to look at it. She did not check the "tear" because she did not want to move the baby again before the paramedics arrived.

After the paramedics stabilized the baby, Ms. Gambrell and her son followed the ambulance to the hospital. She said that her husband left the duplex at the same time because she remembered her son locking the door. She did not recall seeing bleach spots on the carpet when she arrived at the duplex. She said that her son was an excellent father, that he has never had trouble getting employment, and that he initially lied to the police about what happened because he did not want to involve his parents in the investigation. She said that Defendant Gambrell was remorseful about what had happened, and at the time of the incident, he did not realize that he should have immediately called 9-1-1. Ms. Gambrell felt that he did not call 9-1-1 because "he thought he could come and get me and everything would be okay because he has always turned to me when he needed something." Ms. Gambrell stated that both she and her son hired attorneys and attempted to get custody of the baby. She said that her son was right-handed.

Eric Limbo testified that he was an ordained clergy of the Tennessee Conference of the United Methodist Church. At the time of the sentencing hearing, he had served at the Pegram United Methodist Church for three years. For two years prior to serving in Pegram, Mr. Limbo worked at the United Methodist Church in Donelson. Defendant Gambrell was a member of his youth group and they became friends and continued a relationship since that time. He said that although Defendant Gambrell used poor judgment on occasion, he always tried to do the right thing. Defendant Gambrell assisted Mr. Limbo in opening a daycare at the church by working on the

heating and air conditioning in the building. Defendant Gambrell also painted the walls in the daycare and helped lay floor tile. Mr. Limbo recalled that while Defendant Gambrell was performing this work, Defendant Hargrove would frequently call, demanding to know where he was and telling him to come home. Defendant Gambrell would usually leave after these phone calls.

Mr. Limbo did not believe Defendant Gambrell was capable of hurting another individual and did not think that he inflicted injuries to the baby. He believed Defendant Gambrell to be a "very good individual." Mr. Limbo helped Defendant Gambrell find a job when he was fired for his involvement in the present case. Mr. Limbo said that if Defendant Gambrell had known the baby was alive, he would have called 9-1-1 immediately. Mr. Limbo was with the family at every juvenile court appearance wherein Defendant Gambrell's parental rights were at issue. Defendant Gambrell did not want to relinquish his parental rights, and although they did not have the means, his family "scraped up the money to hire attorneys" to assist in retaining his parental rights. Mr. Limbo participated in a supervised visitation between Defendant Gambrell and the baby and said that he did not feel uncomfortable with Defendant Gambrell around the child. Defendant Gambrell's wife does not work, and according to Mr. Limbo, his family would be "destitute" should he be sentenced to serve time in the penitentiary. Mr. Limbo stated that he would continue as Defendant Gambrell's mentor if Defendant Gambrell was not sent to prison.

Miranda Malone testified that she worked at the Mental Health Cooperative in Gallatin and served as Defendant Hargrove's case manager from May 2003 through November 2004. Defendant Hargrove began utilizing the cooperative's services in February 2002. At that time, she was diagnosed with major depressive disorder, but her diagnosis was later changed to bipolar disorder. Ms. Malone met with Defendant Hargrove regularly at a minimum of twice a month. Initially, there was trouble regulating Defendant Hargrove's medication, and there were times when her medicine lapsed and she did not take it. The medicine was eventually regulated. Ms. Malone said there is reason to be concerned about any individual suffering from bipolar disorder who is off his or her medication for an extended period of time.

The majority of Ms. Malone's visits with Defendant Hargrove took place at the home where Defendant Hargrove lived with her mother, her sister, and her five-year-old niece. Ms. Malone testified that Defendant Hargrove seemed to have a "very loving relationship with [her niece]." Ms. Malone made frequent visits to the home in which she observed Defendant Hargrove playing with her niece. She was also aware that Defendant Hargrove often picked her niece up from school. Eventually, her sister left the home, and Defendant Hargrove and her mother became the sole caretakers for her niece.

When Ms. Malone first met Defendant Hargrove, "she was very guarded, almost childlike," and she was dependant on others to support her and make her decisions. Ms. Malone said that as the medicine began to take effect, Defendant Hargrove became more trusting and open to discussing various topics. Ms. Malone described her as having social anxiety, but said that she "seemed to be a very caring person."

According to Ms. Malone, Defendant Hargrove has consistently maintained her innocence and said that she relinquished her parental rights only because she thought the adoptive parents would be better able to provide for her daughter's well being. She said she could not provide the material possessions her daughter would need. She showed Ms. Malone pictures of her daughter and repeatedly said she was "relieved" she had been adopted by "loving people."

Defendant Hargrove was a twenty-two-year-old at the time of the sentencing hearing and still lived with her mother, her sister, and her niece. She did not graduate from high school, but she was attending an adult education class to obtain her high school diploma. She testified that except for a month long illness, she had been actively looking for employment since the incident, but had not been able to find a job.

According to Defendant Hargrove, in the early stages of their relationship, Defendants Gambrell and Hargrove had fun together and saw each other every day. The relationship quickly declined after the initial phase and Defendant Gambrell became both physically and mentally abusive toward her. He told her that she was worthless and that nobody would want to be with her except for him because she was not good enough for anybody else. He also hit her "open-handed" and with his fist. This abuse continued for approximately two years.

Although no one witnessed the abuse, Defendant Hargrove claimed to have frequent bruises, including bruises on her arms from his fingers. She said she never told anyone about this abuse because she was ashamed and did not want anyone to know it was happening. She said her friends did not see it because Defendant Gambrell no longer allowed her to talk to them. Defendant Hargrove said that Defendant Gambrell was "controlling" and everything had to be his way. She said that if she was not at home when he was expecting her, he would repeatedly call her cell phone and demand to know her location.

Defendant Hargrove explained that she did not have a good relationship with her sister because she was raped by her sister's ex-husband when she was eight years old. She said that she reported the rape and a "rape kit" was done at the hospital. She said the man was never charged because the police could not find him. She said that the rape affected her mentally and it is something that she lives with every day. She said it has not altered her relationship with men except for situations where they become aggressive, then she tends to "back off." She never received counseling for the rape.

Defendant Hargrove denied that she knew that she was pregnant in April 2001. She said that she had her period every month and never felt the baby kick or move. She did not gain any weight and did not look like a "normal" pregnant woman. She said that she saw her primary care physician two times during her pregnancy. Prior to that, she had seen him in November 2000, at which time she weighed ninety-seven pounds.

On the day of the incident, she said that she prepared to go to work as usual. She took a shower and then felt a sharp pain in her abdomen. She slid down the wall in the bathroom and began

yelling for Defendant Gambrell. Defendant Gambrell finally came to the bathroom and helped her deliver the baby. She said she really did not know what was happening and she never saw the baby. Defendant Gambrell took the baby out of the bathroom, she heard some rustling in the kitchen, and then heard the front door shut. She went outside to investigate and Defendant Gambrell was standing by the trunk of her car, laying the baby in the trunk. She tried to stop him and Defendant Gambrell shoved her against the house and caused her to hit her head on the bricks. He then dragged her back into the house and laid her on the bed. The next thing she became aware of was Defendant Gambrell's mother saying that they needed to do something with the baby.

Defendant Hargrove got up from the bed and went to the bathroom where Defendant Gambrell and his mother had the baby. She said that she looked down and saw that the baby's neck was cut. She denied cutting the baby's neck and said that she did not know who had done it. The paramedics arrived shortly after that and she said that they refused to allow her into the house. Defendant Hargrove and the baby were then taken to the hospital in an ambulance. She said that during this ride one of the paramedics informed her that she had given birth to a baby girl. She said she was concerned for her daughter's well-being. No one notified Defendant Hargrove's family about what happened. Her mother saw the story on the six o'clock news.

Defendant Hargrove said that she spoke with Defendant Gambrell and his mother prior to speaking to the police. She said that she asked them what had happened and they told her that she hurt the baby. She said she believed them because she had no memory of what happened. She did not recall talking to the police at the hospital and barely recalled being interviewed at the police station. She said that she told the police she was responsible for cutting the baby's throat because she believed it to be true. She said that when she thought she was responsible for the injuries, she felt horrible about having hurt the baby. She said that she was left-handed.

Defendant Hargrove said that she first remembered that she had not cut the baby's throat when she was with her psychiatrist, Dr. Kay. Dr. Kay was able to assist her in remembering what happened by walking her back through the events of the day. She said she felt relieved to know that she did not harm the baby, but she was angry, hurt, and sad about what had happened. She explained that she gave up her parental rights because her daughter was two years old at the time of the adoption hearing and her adoptive parents were the only family her daughter had ever known. She felt that it would be unfair to uproot her daughter and that it was in her daughter's best interest to stay with her adoptive parents. She said that prior to learning she had not cut the baby's throat, she wanted Defendant Gambrell to have custody of their daughter.

At the time of the sentencing hearing, Defendant Hargrove had not taken her medication for two weeks because she did not have a ride to her doctor's appointment to renew her prescription. Because the next available appointment coincided with her court date she said that she had not been able to get her prescription. She said that she felt better when she was taking her medicine. She tested positive for marijuana on the day of the hearing. She said that the last time she had used marijuana was thirty days prior to the hearing date and that she did not regularly use marijuana. Defendant Hargrove had several individuals in attendance in her support, two of whom attended

Madison Church of Christ with her. According to Defendant Hargrove, none of these people were able to take her to her doctor's appointment.

On cross-examination, Defendant Hargrove admitted that she had heard the recordings in which she requested that they bury the baby next to her dog at her mother's house. She said that her mother's house was comfortable, loving, and secure. She acknowledged that she could have told her mother that she was being abused by Defendant Gambrell but she chose to remain in the relationship. Although, he never threatened to kill her or beat her up, she said she was afraid of what would happen if she did not continue to date him. She never attempted to stop seeing him, she just assumed he would become violent if she refused him. She said she never called the police, and she never told her mother. She said she hid the bruises on her face with make-up. She admitted that the day of the sentencing hearing was the first time she had publicly admitted the abuse. At the time of the alleged abuse, Defendant Gambrell worked twelve hour shifts at night and Defendant Hargrove worked during the day.

Defendant Hargrove insisted that it was not her habit to make up stories and tell things that were not true. She said she had never before experienced a blank period where she could not remember what had happened. She agreed that a person who cut a newborn infant's throat with a knife deserved to be prosecuted to the fullest extent of the law She said that the story she initially told the police matched Ms. Gambrell's story because it was what Ms. Gambrell told her had happened. She admitted that her attorney instructed her to meet with Dr. Kay so that he could help her remember what happened, and that this meeting occurred after she learned she could possibly receive fifteen to twenty-five years for her actions.

Defendant Hargrove did not remember telling the paramedics that she used a knife to cut the baby's throat. She did not recall describing the knife in detail or telling the paramedics where the knife could be found. She did not remember telling the paramedics that she and Defendant Gambrell could not afford a baby. She recalled only that one of the paramedics in the emergency room kept her informed about what they were doing to help the baby.

The baby's adoptive mother testified that she has had custody of the baby since she was twenty-five days old. After leaving the hospital, the baby had to be monitored for seizures and had regular doctor visits to clean and protect the wound on her neck. At the time of the hearing, the baby was almost four years old and was a healthy, active child. Her mental development was age appropriate.

It was the opinion of the adoptive mother that the injuries to the infant were caused by a right-handed person. She said that she simulated tests with a life-size baby doll and a plastic knife in an attempt to determine which hand the aggressor used. According to the adoptive mother, she could not orient herself to the baby doll in such a way as to recreate the wounds using her left hand. She was aware that Defendant Hargrove was left-handed, and she had doubts about her guilt when she learned Defendant Hargrove had confessed to cutting the victim. She expressed her opinion and concerns to Detective Coleman.

The adoptive mother said that Defendant Gambrell's supervised visitation concerned her. She said that he consistently used less than the time period allotted to him, often arriving late and returning the child early. Diapers often came back unused and the baby unchanged. When the baby began to eat food, the food was returned from the visits unopened. She kept records of these visits and faxed her records to the Department of Children's Services. She also thought the baby suffered a "setback" during the court ordered visitation period that preceded the adoption trial.

On cross-examination, the adoptive mother acknowledged that Defendant Gambrell, his parents, and his aunt and uncle were all interested in adopting the baby. She admitted that only Defendant Hargrove wanted the adoptive parents to have custody. Defendant Hargrove had never seen the child with the adoptive parents and had never seen the parents outside of the courtroom. The adoptive mother admitted that she came up with the theory that the baby's throat had been cut by a right-handed person. She then repeated her theory to Defendant Hargrove's attorneys, the district attorney's office, and Detective Coleman. All of this took place prior to her filing a petition to adopt the baby. The adoptive mother said that she did not believe that Defendant Hargrove had anything to do with harming the baby.

Tim Langford worked as a paramedic for the Nashville Fire Department. On the day of the incident, Mr. Langford and David Whisenant responded to the call from Defendant Gambrell's house. After receiving the call, it took approximately three minutes for the paramedics to arrive at the scene. Mr. Langford said that when they arrived at the house, Defendants Gambrell and Hargrove were standing in the doorway and he had his arm draped across her shoulders. There were "two or three" people outside the home and "two or three" people inside the home, excluding Defendants. Defendant Hargrove told the paramedics where to find the baby. The baby was wrapped in a towel and laying in the living room floor. Mr. Langford said that he "didn't really notice any emotion" on the Defendants' faces.

Defendant Hargrove identified herself as the mother of the infant. Mr. Langford determined that Defendant Hargrove was stable because she was standing and able to walk around. He then attended the baby. The baby was blue, cold, and Mr. Langford initially thought she was dead. When she moved, he realized she was alive, but in critical condition. The umbilical cord was still attached and Mr. Langford removed both the cord and the placenta.

Mr. Langford said that as they arrived at the scene, the 9-1-1 dispatcher informed him that the caller had said the baby had a hole in its neck. However, no one at the scene told him about the hole in the baby's throat. Mr. Langford attempted to ventilate the baby by placing a bag valve mask over her face. He said that he heard a hissing sound and realized the air was not getting to the baby's lungs. He then hyperextended the baby's neck in an attempt to reposition her head and arrange the mask on her face. At this point, he noticed the "jagged cut" across the baby's neck. Mr. Langford said that the cut transected the trachea and extended across the baby's neck. He began ventilating the baby through the hole and this, combined with the position of the neck, allowed her to get oxygen.

At the scene, Mr. Langford made a blanket inquiry to everyone in the room to see if anyone knew how the baby sustained the injury to her throat. No one at the scene responded to Mr. Langford's question. Once they were inside the ambulance, Mr. Langford again asked Defendant Hargrove what happened to the baby's neck. She responded that the baby was born with the hole in her throat. The paramedics transported the baby and Defendant Hargrove to the hospital. According to Mr. Langford, Defendant Hargrove showed no emotion on the way to the hospital. He said that he "kept referring to the baby as she, and at one point [Defendant Hargrove] said: "Oh, it's a girl." Mr. Langford said he then "saw maybe a tear kind [of] well up in her eye, and that was it."

At the hospital, Mr. Langford provided Defendant Hargrove with updates on the baby's status. On his final trip to her room, other people had come in from the waiting area and he noticed that it was a "light-hearted situation." He said that he observed Defendant Hargrove smiling and chuckling. He did not feel that this was "quite right," and he did not return to the room.

On cross-examination, Mr. Langford said that Defendant Hargrove told him she did not know she was pregnant. She also told him that she ran to her next door neighbor's house for help. The neighbor moved the baby from the bathroom floor to the living room floor and wrapped her in a blanket. Ms. Hargrove told him that she was home alone during the delivery. He did not observe any injuries to Defendant Hargrove's face or head. The living room was the only room in the house that Mr. Langford observed. He said he did not see a lot of blood in that room and saw only "two to three drops of blood on the sidewalk outside the house." He did not know where the baby was born, nor did he see an area that looked like someone had given birth.

David Whisenant of the Metro Nashville Fire Department was the other paramedic accompanying Mr. Langford on the day of the incident. Mr. Whisenant testified that Defendant Hargrove and Defendant Gambrell were standing in the doorway of the home when the paramedics arrived at the scene. Defendant Gambrell had his arms draped over Defendant Hargrove's shoulders and they appeared calm. He could not recall anybody else at the scene. He did not witness Defendant Gambrell flagging them down to indicate at which house the emergency was occurring.

Mr. Whisenant attended to Defendant Hargrove and determined that she had just given birth to the baby girl. She told him that she had delivered the baby about an hour prior to their arrival and that she was alone at the house when this occurred. Defendant Hargrove also told Mr. Whisenant that she did not know she was pregnant, and that her last period was four months prior to the baby's birth. Defendant Hargrove did not give a clear statement regarding what happened to the baby's neck.

At the hospital, Defendant Gambrell approached Mr. Whisenant to make "small talk." He told Mr. Whisenant that he could not seem to stay away from hospitals, and then explained that he worked maintenance at Centennial Hospital. Mr. Whisenant distinctly remembered the conversation because he found it odd how calm and unshaken Defendant Gambrell appeared in light of the situation. He also noted that Defendant Gambrell asked no questions and expressed no concern

about the baby's condition. Mr. Whisenant did not know if Mr. Gambrell was aware at that point that someone had inflicted the injury to the baby's neck.

Mr. Whisenant did not notice any blood at the scene. He said the baby looked near death because of its coloring and lack of respiration. The baby's neck appeared to have a "tear or a gash" in it. As they arrived at the scene they heard the dispatcher refer to a hole in the baby's throat, but no one on the scene mentioned the injury. It was not until they were at the hospital trying to determine what had happened that Mr. Whisenant and Mr. Langford began to realize that something was not natural about the injury and what had occurred.

At the conclusion of proof, the trial judge identified several enhancement factors, but found that Defendants failed to demonstrate any mitigating factors and failed to establish their suitability for a sentence of split confinement. The trial court sentenced Defendants to serve the minimum eight-year sentence in total confinement. This appeal followed.

**II. Analysis**

On appeal, both Defendants raise the single issue of whether the trial court properly imposed a sentence of total confinement. This court's review of a challenged sentence is a *de novo* review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely *de novo* without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

We conclude that the trial court properly considered all of the sentencing principles. As such, our review is *de novo* with a presumption of correctness. In conducting our *de novo* review of a sentence, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-210(b), -103(5).

As stated, Defendants argue that the trial court erred in failing to order a sentence of split confinement. Split confinement is a form of alternative sentencing in which "[a] defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense." T.C.A. § 40-35-306(a) (2003). In the absence of evidence to the contrary, a defendant is presumed to be a favorable candidate for

alternative sentencing if the defendant "is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony." T.C.A. § 40-35- 102(6). If, however, a defendant is convicted of a Class B felony, then he or she is not entitled to a presumption in favor of alternative sentencing and "the state ha[s] no burden of justifying confinement through demonstrating the presence of any of the considerations upon which confinement may be based." *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, 2000 WL 1772518, at * 2 (Tenn. Crim. App., at Knoxville, Dec. 4, 2000) (no Tenn. R. App. P. 11 application filed); *see State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996) (state must justify confinement by showing "evidence to the contrary" when defendant is a presumptive candidate for alternative sentencing). Thus, a defendant convicted of a Class B felony "has the burden . . . of presenting proof of his worthiness for consideration of alternative sentencing." *State v. Larry Lenord Frazier*, No. M2003-00808-CCA-R3-CD, 2004 WL 49112, at *4 (Tenn. Crim. App., at Nashville, Jan. 8, 2004) (no Tenn. R. App. P. 11 application filed).

Because Defendants were convicted of Class B felonies, they are not presumed to be favorable candidates for alternative sentencing options. T.C.A. § 40-35-102(6). However, because Defendants received a sentence of eight years as Range I offenders, they are eligible for consideration of alternative sentencing options. *See* T.C.A. §§ 40-35-112(a)(2), -303(a) (Supp. 2005), Sentencing Commission Comments**.** We note that although the law at the time Defendants were sentenced provided that a defendant sentenced to eight (8) years or less was eligible for consideration of alternative sentencing, the current law provides that a defendant sentenced to ten (10) years or less is eligible to be considered for alternative sentencing. *Id*. Tennessee Code Annotated section 40-35-103 provides guidance as to whether the trial court should grant alternative sentencing or sentence the defendant to total confinement. Pursuant to the statute, sentences involving confinement should be based upon whether (A) [c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (B) [c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or (C) [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C).

The trial court may also consider the defendant's potential or lack of potential for rehabilitation and the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. §§ 40-35-103(5), -210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). "[S]entencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of the defendant." *State v. Ring*, 56 S.W.3d 577, 586 (Tenn. Crim. App. 2001). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4).

Additionally, a trial court is not restricted to considering only the crime to which the defendant pled guilty, but may consider what the evidence shows actually happened. *See State v. Robert Allen Leggett*, No. 1999-01066-CCA-R3-CD, 2000 WL 378346, at *3-4 (Tenn. Crim. App.,

at Nashville, April 14, 2000) (no Tenn. R. App. P. 11 application filed) (citing *State v. Biggs*, 769 S.W.2d 506, 507-08 (Tenn. Crim. App. 1988) ("[i]t is distinctly proper for a trial court to look behind the plea agreement and consider the true nature of the offenses committed.")); *State v. Jennifer E. Oakley*, No. 1999-00850-CCA-R3-CD, 2000 WL 1670930, at *3 (Tenn. Crim. App., at Jackson, Oct. 27, 2000) (no Tenn. R. App. P. 11 application filed) (citing *State v. Hollingsworth*, 647 S.W.2d 937, 939 (Tenn. 1983) ("It is also proper for a trial court to look behind the plea bargain and consider the true nature of the offenses committed.")). Probation has previously been denied based solely on the circumstances of the offense where the offense was of such a nature as to outweigh all other factors which might favor such alternative sentencing. *See State v. Travis*, 622 S.W.2d 529, 533 (Tenn. 1981); *State v. Blackhurst*, 70 S.W.3d 88, 97 (Tenn. Crim. App. 2001); *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). "Thus, even though the defendant might possess full capabilities for rehabilitative alternative sentencing, the trial judge [is] entitled under the law to exercise his discretion to impose a period of confinement under [Tennessee Code Annotated section] 40-35-103(1)(B), provided the record adequately supports the weight he gave th[e] particular sentencing consideration." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In the present case, the trial court denied Defendants' request for split confinement. In so doing, the trial court first considered the enhancement factors set forth in Tennessee Code Annotated 40-35-114. Applying those factors, the trial judge noted that neither Defendant Gambrell nor Defendant Hargrove had a criminal history, indicating that enhancement factor (2) did not necessarily apply. T.C.A. § 40-35-114(2). However, the trial court found it relevant that Defendant Hargrove tested positive for marijuana on the day of the sentencing hearing, which indicated disregard for the law and lack of potential for rehabilitation. The trial court applied enhancement factor (5), finding that the victim was "particularly vulnerable due to age or physical or mental disability." T.C.A. § 40-35-114(5). The court noted that newborn babies cannot defend or protect themselves in any way and are completely dependent on others for survival.

The trial judge also found enhancement factor (6) appropriate, finding that Defendants "treated or allowed the victim to be treated with exceptional cruelty during the commission of the offense." The trial judge applied factor (16) finding that Defendants "abused a position of public or private trust" in that they were the parents of the infant whose throat was cut. T.C.A. § 40-35-114(5). Finally, the court found factor (20) applicable, finding that the baby would have died without the immediate medical treatment administered by the paramedics. T.C.A. § 40-35-114(4). The court also found it significant that it was Defendant Gambrell's parents, not Defendants, who called 9-1-1 and facilitated the emergency medical response.

The trial judge found no applicable mitigating factors pursuant to Tennessee Code Annotated 40-35-113 or otherwise, which would have justified a sentence of split confinement. The court noted the persistent lack of candor Defendants exhibited and the multiple stories they told regarding what had happened. The court also noted that Defendant Hargrove "continually admitted cutting this baby's throat . . . but it wasn't until she testified [at the sentencing hearing] that we heard differently." The trial judge felt that this continued dishonesty, coupled with Defendant Hargrove's drug usage while released on bond, was evidence of her inability to be rehabilitated. The trial court

also found that there was sufficient evidence to conclude that Defendant Gambrell assisted in delivering the child despite his persistent denial of this fact. In denying a sentence of split confinement, the trial court indicated that total confinement was necessary to avoid depreciating the seriousness of the offense.

Additionally, the trial court stated that even where a defendant is a first offender, a sentence may be imposed without granting any form of probation where the nature and circumstances of the offense are "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree." *State v. Bingham*, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995). The trial judge went on to say, "through my entire history with the criminal justice system, . . . this is one of the most violent, horrifying, shocking, and reprehensible crimes that I've seen. For a newborn baby to have its throat slit[,] to be left in a trunk of a car to die, nobody calling 911, there are just so many other alternatives that were available. Nobody called 911. . . . Even if [Defendant Gambrell] didn't do it, when he opens the trunk of a car and sees a blue baby there, the first thing you're going to do is call somebody, call 911." Defendants were subsequently sentenced to serve the full eight years in confinement.

We conclude that the evidence in the record on appeal supports the trial court's findings. Defendant Gambrell and Defendant Hargrove consistently lied to the police, the paramedics, and the trial court about what actually happened the day of the incident. Defendant Hargrove admitted to cutting the baby's throat. Defendant Gambrell admitted to leaving the blue baby wrapped in a trash bag in the trunk of a car, while he went to his parents house rather than calling 9-1-1. Defendants have failed to establish their suitability for an alternative sentence of split confinement. As such, the trial court properly ordered a sentence of total confinement. Defendants are not entitled to relief in this appeal. Accordingly, the judgments of the trial court are affirmed.

## CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

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THOMAS T. WOODALL, JUDGE